INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statement	2
Argument	6
Conclusion	11

CITATIONS

Cases:

Allen v. *United States*, 164 U.S. 492 10

Commonwealth v. *Tuey*, 62 Mass. 1 9

Cox v. *United States*, 284 F. 2d 704, certiorari denied, 365 U.S. 863 10

Jenkins v. *United States*, 380 U.S. 445 10

Orton v. *United States*, 221 F. 2d 632 9

Speak v. *United States*, 161 F. 2d 562 9

United States v. *Redfield*, 197 F. Supp. 559, affirmed, 295 F. 2d 249, certiorari denied, 369 U.S. 803 9

Statutes:

18 U.S.C. 371 2

18 U.S.C. 659 2

18 U.S.C. 2314 2

790-189—65

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 553

FRANK ANTHONY PUGLIANO AND WILLIAM CARRANZA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 348 F. 2d 902.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 1965. A petition for rehearing was denied on August 12, 1965. The petition for a writ of certiorari was filed on September 9, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence supported petitioners' convictions for possessing and transporting goods stolen from interstate commerce and for conspiracy.

2. Whether the trial court properly gave an "Allen" instruction.

3. Whether trial court made a prejudicial remark within the hearing of the jury.

STATEMENT

Petitioners were indicted in the United States District Court for the District of Massachusetts in three counts for (1) conspiracy to receive and transfer cotton underwear goods, knowing them to have been stolen while moving as an interstate shipment, (2) the substantive offense of possessing such goods, and (3) transporting the goods from Massachusetts to New York City, in violation of 18 U.S.C. 371, 659 and 2314 (R. 4–6). At the conclusion of the government's evidence, the trial court directed a judgment of acquittal on count 3 (R. 127, 164–165). Petitioners were convicted on counts 1 and 2. Each received a single sentence of imprisonment, Pugliano for eighteen months and Carranza for two years (R. 165–168). The court of appeals affirmed.

The evidence for the government was largely circumstantial. It showed that on the morning of Saturday, September 28, 1963, petitioners Carranza and Pugliano met with co-conspirator B'Shara at Springfield, Massachusetts.[1] Carranza expressed a desire to find a warehouse and B'Shara introduced Pugliano to the owner of a garage in the neighboring

[1] At the time of trial B'Shara had pleaded guilty to charges of possessing goods stolen from an interstate shipment under an indictment returned prior to the indictment naming petitioners. B'Shara had been convicted in 1950 on a state charge of receiving stolen property (R. 38).

town of Agawam that could be so used. In answer to the garage owner's question as to the proposed use of the premises, Pugliano said that he sometimes bought out bankrupt merchandise. A monthly rental of $125 was agreed upon (R. 38–43). The owner required a waiver of liability, which Pugliano signed as "John Demers" (R. 42–45, 60–61, 156, Govt. Ex. 10).

On the following morning, at about four o'clock, a truck drawing a trailer, followed by another truck and two cars, were seen on a street in Worcester, Massachusetts (R. 26). Later in the morning, the trailer was found abandoned near a railroad bridge in Worcester (R. 27). The trailer was identified as one delivering a shipment of 150 cartons of cotton garments, valued in excess of $74,000, from the William Carter Company at Senatobia, Mississippi, to Needham Heights, Massachusetts, via Akers Motor Lines (R. 37–38, 15–16, 114, 155, Govt. Ex. 6). The terminal manager of the Akers Company at Boston testified that he knew the trailer had been delivered to his terminal on Saturday night, September 28–29, because the freight bill had been deposited by the incoming driver in the bunkroom, where it was collected and brought to his office. The manager had no occasion to verify the physical presence of the trailer until the following Tuesday, when it was found to be unavailable for hauling on the final leg of the journey to Needham Heights (R. 28–35). The employee who had made the collection of freight bills from the bunkroom did not recollect the particular freight bill; he did notice, however, while making his rounds on

Saturday night, that the lights in the lot where the trailers were parked had been ripped down (R. 36).

About three weeks after the garage at Agawam had been let to Pugliano, the owner visited it with a prospective tenant. He could not see what was stored, as the windows had been covered with soap. He called B'Shara and demanded possession, saying that he had a tenant who was going to take the building on a three- or four-year lease at $150 a month. Carranza told B'Shara that he had merchandise stored in the garage and offered the next month's rent. The owner, however, insisted upon receiving possession, although he did not rent the premises until the following month, and then to a different tenant (R. 62–63).

At Carranza's request, B'Shara located a building at Chicopee to be used as a warehouse and arranged for the rental in the name of Demers. B'Shara supervised the transfer of the merchandise from Agawam to Chicopee. He saw about 150 average size cartons. One of them, which broke open during the transfer, was seen to contain infants' underwear. About a week later, Carranza reimbursed B'Shara for his expenses in this transfer and for the month's advance rental. He told B'Shara, "I see you did a lot of work for us. You will be well compensated if we sell the merchandise." Carranza later paid the December rent through B'Shara (R. 47–53).

A truck driver by the name of Bilotti testified that on December 6, 1963, he met two trucks at New York City carrying 149 cartons of Carter underwear. One of the trucks had been rented by Robert Joseph

Suse, who was identified from a photograph (R. 119–122, 115–118). A subsequent search of this truck resulted in the recovery of a package containing twelve pieces of Carter underwear (R. 116). The driver receiving these loads at New York City transferred them to his truck and delivered the goods to three different private homes, one in New York City, one in North Bergen, New Jersey, and the other at a town in New Jersey which he could not identify (R. 123–124).

On December 11, 1963, ninety-six cartons of Carter underwear were recovered at an address in East Rutherford, New Jersey. The tag attached to one carton, which had not been detached or obliterated, showed the number C–2912, one of the numbers of the stolen shipment (R. 22–24, 151, Govt. Ex. 1, R. 19–20). Tags of a type used by the Carter Company, but which failed to identify the particular shipment, were recovered from the two warehouses which petitioners had rented in Agawam and Chicopee (R. 66–67).

Some time in December, petitioners told B'Shara that the F.B.I. had picked up a truckman by the name of Suse who was taking the "stuff" down to New York City and told B'Shara not to get panicky if he were arrested (R. 53–56). Petitioners expressed their sympathy to B'Shara after his indictment, to which he replied, "That's all right, I'm the guinea pig. That's all right." Carranza also warned him, "I know you got indicted but be careful, you and your attorney, there's a lot of big people involved in this merchandise, you know" (R. 56–57).

ARGUMENT

1. The evidence supported both the substantive and conspiracy charges. The jury could properly infer that the Mississippi shipment had been delivered to the truck terminal in Boston from the fact that the freight bill, customarily left in the bunkroom by arriving truckers, was collected in the usual course of business and brought to the office. The theft of the shipment after delivery was established by the facts that, at about four o'clock of the following morning, the trailer which had carried the shipment was seen in the neighboring city of Worcester in circumstances which suggested that a transfer of its cargo may have been imminent and that the trailer was subsequently found abandoned.

Petitioners' connection with this theft was established by a number of circumstances. Within a few hours before the shipment was due to arrive, petitioners arranged under a false name for the rental of a garage at Agawam to be used as a warehouse. After they placed goods in the garage, they soaped over its windows. When B'Shara arranged for and supervised the transfer of goods to another warehouse, he observed about 150 cartons and one of the cartons, which fell and broke open, contained underwear. Carranza at this time promised B'Shara that he would be paid well if they succeeded in selling the merchandise, a condition which suggests unlawful ownership. In addition, the delivery of 149 cartons of underwear to New York and New Jersey—cartons identified as part of the stolen shipment by one tag whose marking had not been destroyed or oblit-

erated—was tied to petitioners by their subsequent conversation with B'Shara identifying one of the drivers. To this was added the discovery of tags in both Massachusetts warehouses rented by petitioners which indicated that the stolen shipment had been stored in them, and the inculpatorily warning remarks made by petitioners to B'Shara about his defense.[2]

2. Following the jury's retirement at 10:55 a.m., they returned at 4:20 p.m. and reported that they had been unable to agree upon a verdict (R. 147). The court then gave the following instruction (R. 147–148):

> The only mode, provided by our constitution and laws for deciding questions of fact in criminal cases, is by the verdict of a jury. In a large proportion of cases, and perhaps, strictly speaking, in all cases, absolute certainty cannot be attained or expected. Although the verdict to which a juror agrees

---

[2] Petitioners argue, although not raising the matter as one of the questions presented by the petition, that the indictment did not charge guilty knowledge on their part that the goods had been stolen while constituting an interstate shipment of freight (Pet. 24). The indictment charged that petitioners and others knowingly conspired to possess the goods in question, "knowing the [said goods] to have been stolen, and the said chattels and goods having been stolen from the Akers Motor Lines, Inc. depot at Boston, Massachusetts while the said chattels were moving as, were a part of, and constituted an interstate shipment of freight and express." While the meaning would have been clarified by placing a comma between the words "stolen" and "from," the indictment fairly charges petitioners with knowing the goods to have been stolen from an interstate shipment. Especially after verdict, a complaint about any possible ambiguity is without substance.

must of course be his own verdict, the result of his own convictions, and not a mere acquiescence in the conclusion of his fellows, yet, in order to bring 12 minds to a unanimous result, you must examine the questions submitted to you with candor, and with a proper regard and deference to the opinion of each other. You should consider that the case must at some time be decided; that you are selected in the same manner, and from the same source, from which any future jury must be; and there is no reason to suppose that the case will ever be submitted to 12 men [and women] more intelligent, more impartial, or more competent to decide it, or that more or clearer evidence will be produced on the one side or the other. And with this view, it is your duty to decide the case, if you can conscientiously do so * * * in conferring together, you ought to pay proper respect to each other's opinions, and listen, with a disposition to be convinced, to each other's arguments. And, on the one hand, if much the larger number of your panel are for a conviction, a dissenting juror should consider whether a doubt in his own mind is a reasonable one, which makes no impression upon the minds of so many men [and women], equally honest, equally intelligent with himself, and who have heard the same evidence, with the same attention, with an equal desire to arrive at the truth, and under the sanction of the same oath. And, on the other hand, if a majority are for acquittal, the minority ought seriously to ask themselves, whether they may not reasonably, and ought not to doubt the correctness of a judgment, which is not concurred in by most of those with whom they are associated; and

> distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellows.
>
> Now, with that instruction, members of the jury, you may return to your jury room and see whether or not you can agree upon a verdict in this case.

The record shows no objection to this supplemental instruction. On motions for new trial, however, petitioners stated that the trial court had refused to include in this charge language from *Commonwealth* v. *Tuey,* 62 Mass. 1, relating to the burden of proof upon the government (R. 163, 171).[3] Since the record does not show that such a request was made in timely fashion, the court of appeals properly held that the point had not been preserved. It would not, in any event, have been reversible error to fail to include this language in view of the extensive references in the original charge to the government's burden (R. 132, 138, 139, 140). See *Orton* v. *United States,* 221 F. 2d 632, 635–636 (C.A. 4); *Speak* v. *United States,* 161 F. 2d 562 (C.A. 10); *United States* v. *Redfield,* 197 F. Supp. 559, 590 (D. Nev.), affirmed, 295 F. 2d 249, certiorari denied, 369 U.S. 803. We note, in addition, that the balanced and cautious language of the instruction here given is in strict conformity with the require-

---

[3] The language allegedly requested was as follows (R. 163): "In order to make a decision more practicable the law imposes the burden of proof on one party or the other in all cases. In the present case, the burden of proof is upon the (Government) to establish every part of it, beyond a reasonable doubt; and if, in any part of it, you are left in doubt, the defendant is entitled to the benefit of the doubt, and must be acquitted."

ments of *Allen* v. *United States,* 164 U.S. 492, and in contrast to the coercive language disapproved in *Jenkins* v. *United States,* 380 U.S. 445.

3. Petitioners urged in their motion for new trial that the trial court made a prejudicial remark in response to objections by the United States Attorney to the dismissal of the third count of the indictment. They urged that this remark was heard by one of the defendants and was loud enough to be heard by the jury, two of whose members laughed aloud (R. 162).[4] It is now alleged that the remark was clearly heard by both petitioners and that counsel possesses affidavits showing that the jurors did hear it (Pet. 32). No record was made of the bench conference and no affidavits relating to the incident appear in the record or appendices in this Court or the court of appeals. The trial judge filed a statement in connection with the motion for a new trial that he did make the remark but that it was at the side of the bench away from the jury during a discussion which lasted about five minutes; that he at no time raised his voice but talked in the same tone as in various other bench conferences; and that he was satisfied that the remark was inaudible to the jury (R. 34). Under these circumstances, it was not error for the court of appeals to refuse to overturn the conviction because of this incident. Cf. *Cox* v. *United States,* 284 F. 2d 704, 710–711 (C.A. 8), certiorari denied, 365 U.S. 863.

---

[4] The statement made was (R. 162):

"What do you care about a third count, there's enough evidence in on the first two counts to hang a king."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys.

OCTOBER 1965.

END